

IN THE COURT OF APPEALS 02/13/96

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00493 COA

TOMMY RAY WARREN a/k/a

TOMMIE RAY WARREN

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. LARRY EUGENE ROBERTS

COURT FROM WHICH APPEALED: WAYNE COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

ERIC TIEBAUER

LOUIE BISHOP

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: SCOTT STUART

DISTRICT ATTORNEYS: DAN ANGERO

DAVE HARBOUR

NATURE OF THE CASE: RAPE

TRIAL COURT DISPOSITION: CONVICTION AND SENTENCE OF 30 YEARS IN THE

CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO PAY A FINE OF \$1,000

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

Tommy Ray Warren was indicted by a Wayne County grand jury and convicted of the rape of fifteen-year-old C.J. The court sentenced Warren to serve thirty years in the custody of the Mississippi Department of Corrections and to pay a \$1,000 fine and costs of \$188. Warren claims on appeal that the trial court erred in overruling his motion for continuance and that a discovery violation improperly allowed a State's eyewitness to testify. Warren contends that either or both issues would require a new trial. We find no merit to these issues and affirm Warren's conviction and sentence.

FACTS

Warren and his live-in companion, S.J., and her three children had lived together for about six years. On the evening of August 15, 1993, Warren allegedly raped C.J., S.J.'s fifteen-year-old daughter. C.J. testified for the State that Warren was the person who had raped and threatened her. S.J. also testified for the State that Warren had threatened to kill her and her three children and burn their house with them in it if she and C.J. did not drop the rape charges. A neighbor, Wayne Rankin, and Rankin's aunt were walking by C.J.'s house on the evening of the rape. Rankin, in an effort to mischievously scare C.J., noticed an open window and peeked inside. He saw Warren and C.J. engaged in sexual relations; both Warren and C.J. also saw Rankin before he left. Rankin told his aunt what he had seen. Warren got a large knife and went after Rankin, who grabbed an iron pipe. Nothing resulted from this encounter -- Warren told Rankin that someone had peeped in the window at him and his old lady (meaning S.J.). Warren went into Rankin's aunt's house and again tried to tell Rankin, his aunt, and his uncle that someone had been peeping in his window at him and his old lady while they were having sex. Rankin's aunt, wanting to check on S.J., went to the latter's house accompanied by Rankin and Warren. Rankin said that he told S.J. what really happened the next day when Warren was not there.

Warren and his mother testified in his defense. Warren stated that on the evening of the alleged incident he had heard two bumps at a window, opened a door, and saw Rankin "scooting" out a window. He said Rankin later found a pipe and chased him back into the house. Warren testified that he got a knife from the kitchen for protection, but S.J. said that she would have none of that in her house. Warren denied raping C.J. and contended that C.J. was not even in the bedroom when he saw Rankin leaving through her bedroom window. The jury found Warren guilty of rape. Warren appeals his conviction and sentence.

ANALYSIS

I. DID THE TRIAL COURT ERR IN DENYING WARREN'S MOTION FOR A CONTINUANCE?

Warren contends that his ore tenus motion for continuance was improperly denied. He argues that he was unable to contact his attorney due to his medical condition and the distance between his home and the attorney's office. However, Warren did not cite the court's denial of his motion for continuance as a ground supporting his request for a new trial or JNOV.

Mississippi caselaw supports the well-settled doctrine that "[a] trial court cannot be put in error on a matter not presented to the court for decision." *Chase v. State*, 645 So. 2d 829, 846 (Miss. 1994) (citations omitted). The Mississippi Supreme Court has held that, on a motion for a new trial, certain errors must be brought to the trial judge's attention so that he or she may pass on their validity before an appellate court can review them. *Metcalf v. State*, 629 So. 2d 558, 561-62 (Miss. 1993) (citation omitted). One such error is the denial of a continuance. *Id.* A denial of a continuance is not reviewable on appeal unless the party whose motion for a continuance was denied moves for a new trial on that ground. *Id.* (citations omitted).

Moreover, the court has consistently held that "[t]he decision to grant or deny a continuance is left to the sound discretion of the trial court." *Atterberry v. State*, No. 92-KA-00731-SCT, 1995 WL 753992, at *10 (Miss. Dec. 21, 1995) (citations omitted). An appellate court should not reverse unless manifest injustice appears to have resulted from the denial of the continuance. *Id.* (citations omitted); see also *Johnson v. State*, 631 So. 2d 185, 189 (Miss. 1994) (citations omitted) (decision to grant or deny continuance is left to sound discretion of trial court and should not be reversed unless manifest injustice results from the denial of continuance). A defendant must show both an abuse of discretion and that this abuse actually worked an injustice in his case. *Morris v. State*, 595 So. 2d 840, 844 (Miss. 1991) (citations omitted). Mississippi statutory law states that "[a] denial of the continuance shall not be ground for reversal unless the supreme court shall be satisfied that injustice resulted therefrom." Miss. Code Ann. § 99-15-29 (1972).

In the present case Warren moved for a new trial or JNOV during his sentencing hearing, but failed to cite the denial of his motion for continuance as a ground for his request. He is therefore procedurally barred from consideration of this issue on appeal. Alternatively on the merits, Warren has failed to show that an abuse of discretion existed or that any abuse resulted in injustice to him. Warren never contacted a lawyer during the five-month period from the incident until he was indicted. He never saw nor contacted his appointed counsel to discuss his case in the three-month period from indictment to the day of trial. The first time he contacted his counsel was the morning of trial, which was the same day he moved for a continuance. Warren has not shown that he would have been better able to meet the State's evidence given more time. He stated that he had no witnesses who could testify in his defense other than his mother, who eventually did testify on his behalf. Warren has failed to show that the denial deprived him of witnesses who would have provided a defense different than that which he presented at trial. The trial judge found, and we agree, that Warren would not have been any more motivated to prepare for a delayed trial than he was prior to his actual trial. The judge determined, and we also agree, that Warren's medical condition was irrelevant to the issue. We are not convinced that the defense would have been handled any differently had the continuance been granted. Warren has failed to show that he suffered any injustice and that he did not receive a fair trial. We are satisfied that the trial court did not abuse its discretion in denying the continuance.

II. DID THE TRIAL COURT ERR IN ALLOWING A STATE'S EYEWITNESS TO

TESTIFY WHO WAS NOT LISTED AS A WITNESS IN RESPONSE TO WARREN'S WRITTEN DISCOVERY REQUEST?

Warren argues that he should be given a new trial because the trial court permitted Wayne Rankin, an eyewitness to the crime, to testify against him although Rankin was not listed as a witness on his written request for discovery. He believes that, had the State properly given him Rankin's name in advance within the discovery rules, he possibly could have established a complete defense to the crime.

Uniform Rule of Circuit and County Court Practice 9.04 states:

[i]f during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:

1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or other evidence; and
2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall . . . exclude the evidence or grant a continuance . . . for the defense to meet the non-disclosed evidence or grant a mistrial.

URCCC 9.04 I(1)-(2). The Mississippi Supreme Court has also held that, if one party objects to evidence not properly disclosed, the court can grant that party a reasonable opportunity to interview the newly discovered witness. *Tucker v. State*, 647 So. 2d 699, 703 (Miss. 1994) (citation omitted). If that party believes it may be prejudiced by the evidence, it must request a continuance. *Id.* at 704 (citation omitted). Failure to request a continuance constitutes a waiver by that party. *Id.*; *see also Duplantis v. State*, 644 So. 2d 1235, 1249-50 (Miss. 1994) (if defendant, after having been given a reasonable opportunity to familiarize himself with previously undisclosed evidence to which he has objected, believes he may be prejudiced because of his lack of opportunity to prepare to meet it, he must request a continuance or he waives the issue). Finally, it is well-settled that a trial judge cannot be put in error if not given the opportunity to address the issue. *Robinson v. State*, 662 So. 2d 1100, 1104 (Miss. 1995); *see also King v. State*, 615 So. 2d 1202, 1205 (Miss. 1993) (citation omitted) (complaining party must make a contemporaneous objection in order to preserve an error for appellate review).

Here, Warren properly objected to the State's initial attempt to use Wayne Rankin's testimony. The State failed to properly disclose Rankin's name to Warren under the discovery rules, even though the State argued that it did not know Rankin was an eyewitness until the day of trial. The court properly gave Warren the opportunity to interview Rankin, outside the jury's presence, and the chance to inform the court of his position after the interview. The record does not indicate that Warren, after

being given the opportunity to interview Rankin, subsequently claimed unfair surprise or undue prejudice, requested a continuance or mistrial, or objected to Rankin later testifying for the State. The trial judge cannot be put in error on this issue because he was never given the opportunity to address it. We find that Warren therefore waived his right to challenge Rankin's testimony on appeal.

THE JUDGMENT OF THE CIRCUIT COURT OF WAYNE COUNTY OF CONVICTION OF RAPE AND SENTENCE OF THIRTY (30) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, AND TO PAY A FINE OF \$1,000 IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO WAYNE COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR.